

REPORT FROM THE STATE LEGAL SERVICE (DETACHED DEPARTMENT OF THE SLS AT THE SPANISH DPA) ON PROCESSING ACTIVITIES RELATING TO THE OBLIGATION FOR CONTROLLERS FROM PRIVATE COMPANIES AND PUBLIC ADMINISTRATIONS TO REPORT ON WORKERS SUFFERING FROM COVID-19

After examining your request for a report, in relation to the data processing resulting from the current situation arising from the spread of the COVID-19 virus, first of all, in general, it should be clarified that the Personal Data Protection Regulation, while aimed at safeguarding a fundamental right, apply in its entirety to the current situation, since there is no reason to determine the suspension of fundamental rights, nor has such measure been adopted.

Notwithstanding the foregoing, the Personal Data Protection Regulation itself (Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, regarding the protection of natural persons with regard to the processing of personal data and the free circulation of these data and which repeals Directive 95/46/EC, General Data Protection Regulation (or RGPD) contains the necessary safeguards and rules to legitimately allow the processing of personal data in situations, such as the present one, in which there is a general health emergency. Therefore, when applying the provisions foreseen for these cases in the RGPD, in accordance with the sector regulations applicable in the field of public health, the considerations related to the protection of data - within the limits provided by law - should not be used to hinder or limit the effectiveness of the measures adopted by the authorities, especially the sanitary authorities, in their fight against the epidemic, since the personal data protection legal instruments already contain a regulation for such cases that reconciles and weighs the interests and rights at stake for the common good.

Recital (46) of the RGPD already recognizes that in exceptional situations, such as an epidemic, the legal base for processing activities can be multiple, based both on the public interest and on the vital interest of the data subject or another natural person. (46) *“The processing of personal data should also be considered lawful when necessary to protect an essential interest for the life of the data subject or that of another natural person. In principle, personal data should only be processed on the basis of the vital interest of another natural person when the processing cannot be manifestly based under a different legal base. Certain types of processing may respond both to important public interest reasons and to the vital interests of the data subject, such as when the processing is necessary for humanitarian purposes, including control of epidemics and their spread, or in humanitarian emergency situations, or all in case of natural or manmade disasters”*. Therefore, as a legal base for the lawful processing of personal data, without prejudice to other possible bases, such as the fulfilment of a legal

obligation, under art. 6.1.c), RGPD (for the employer in the prevention of occupational risks of its employees) -, the RGPD explicitly recognizes the two already mentioned legal bases: mission carried out in the public interest (art. 6.1.e) or vital interests of the data subject or other natural persons (art. 6.1.d). Art. 6.1, letter d) RGPD considers not only that the vital interest is sufficient legal base for the processing to protect the “*data subject*” (since this is a term defined in art. 4.1) RGPD as an identified or identifiable natural person), but also that the said legal base can be used to protect the vital interests of “*another natural person*”, which by extension means that said natural persons may even be unidentified or identifiable; that is to say, said legal base for the processing (the vital interest) may be sufficient for the processing of personal data aimed at protecting all those persons susceptible to being infected in the spread of an epidemic, which would justify, from the point of view of processing of personal data, in the widest possible way, the measures adopted to this end, even if they are aimed at protecting unnamed or in principle unidentified or identifiable people, since the vital interests of said natural persons must be safeguarded, and this is recognized by the personal data protection regulations. Paragraph 3 of article 6 GDPR does not establish the need for the legal base “*processing for reasons of vital interest*” to be established by the Law of the Union or the Law of the Member States applicable to the data controller as said section refers exclusively to the processing activities established for the fulfilment of a legal obligation, or for the fulfilment of a mission carried out in the public interest or in the exercise of public powers, both referred to in letters c) and e) of said article 6 RGPD, but not to the processing activities included in letter d). However, for the processing of health data it is not enough that there is a legal base under art. 6 RGPD since in accordance with art. 9.1 and 9.2 RGPD, it is also necessary that there is a circumstance that lifts the prohibition of processing of said special category of data (including health data). The AEPD understands that these circumstances can be found, in this case, in several of the indents of art. 9.2 RGPD. So: (l) In letter b), regulating the relations between employer and employee, since the processing is necessary for the fulfilment of obligations and the exercise of specific rights of the data controller (the employer) or the data subject in the field of Labour Law and Social Security Law and Social Security protection, since the employer is subject to the regulations on the prevention of occupational risks according to section 14, of Law 31/1995, of November 8, on the Prevention of Occupational Risks. By virtue of section 14 and related of said law, there is a duty for the employer to protect workers against occupational risks and guarantee the safety and health of all workers at their service in aspects related to work. For that same reason, art. 29 of Law 31/1995, of November 8, on the Prevention of Occupational Risks, which transposes art. 13 of the Council Directive (89/391/EEC) of June 12, 1989, on the application of measures to promote the improvement of safety and health of workers at work, also establishes obligations for the workers in the field of risk prevention. Thus, it is up to each worker to provide, according to their possibilities and by complying with the preventive

measures that are adopted in each case, for their own safety and health at work and for those of other people who may be affected by his/her professional activity because of their acts and omissions at work, in accordance with their training and the employer's directions. This means that they must immediately inform their direct superior, and the workers designated as officers to carry out protection and prevention activities in the area of occupational safety and health risks or, where appropriate, the occupational risks' prevention service, about any situation that, in their opinion, involves, for reasonable reasons, a risk to the safety and health of workers; contribute to the fulfilment of the obligations established by the competent authority in order to protect the safety and health of workers at work and cooperate with the employer so that he can guarantee safe working conditions that do not entail risks for the worker safety and health.

In the context of the current situation resulting from the covid-19 pandemic, this means that the worker must inform his employer in case of suspected contact with the virus, in order to safeguard, in addition to their own health, that of other workers in the workplace, so that appropriate measures can be taken. The employer must process such data in accordance with the RGPD, and the appropriate security measures and proactive responsibility that the processing demands and must be adopted (art. 32 RGPD). (II) In letter g), and letter i), which can be examined together, since both refer to a public interest, the first of which is described as “*essential*” and the second of which refers to a public interest qualified “*in the field of public health, such as protection against serious cross-border threats to health*”, all based on the law of the Union or of the Member States that establish adequate and specific measures to protect the rights and liberties of the data subject, in particular professional secrecy. (III) In letter h), when the processing is necessary to carry out a medical diagnosis, or evaluation of the worker's work capacity or any other type of health care or for the management of health care systems and social and health assistance services. (IV) A final closing circumstance that would allow the processing of health data could even be established in letter c), in the event that the circumstances provided in this section occur, which would apply when the processing is necessary to protect vital interests of the data subject or of another natural person, in the event that the data subject is not physically or legally capable of giving their consent. Within these criteria, therefore, the RGPD has sought to give the greatest possible freedom to those responsible for the processing activities in case of need to safeguard the vital interests of the data subjects or of other natural persons or the essential public interests in the field of public health or compliance with legal obligations, within the measures established in the corresponding legal regulations of the Member State or of the European Union in each applicable case.

Consequently, in a health emergency situation such as the one referred to in this report, it is necessary to take into account that, in the exclusive scope of the personal data protection regulations, the application of the data protection regulations would allow the data controller to adopt those decisions that are necessary to safeguard the vital interests of natural persons and the compliance with legal obligations or the safeguarding of essential interests in the field of public health, within the provisions of the applicable material regulations.

Those decisions will be, (from the point of view of the personal data protection regulations, as mentioned before) those that those responsible for data processing must adopt according to the situation they are in, always aimed at safeguarding the essential interests already mentioned. But the data controllers, when acting to safeguard those interests, must act in accordance with what the authorities established in the regulations of the corresponding Member State, in this case Spain. Thus, the Spanish legislator has provided the necessary legal measures to deal with health risk situations, such as those of the Organic Law 3/1986, of April 14, on Special Measures in Public Health Matters (modified by Royal Decree-law 6/2020, of March 10, by which certain urgent measures are adopted in the economic field and for the protection of public health, published in the Official State Gazette of March 11, 2020) or Law 33/2011, of October 4, General of Public Health. Article 3 of the first of said regulations states that “[c] with the aim of controlling communicable diseases, the health authority, in addition to carrying out general preventive actions, may adopt the appropriate measures for the control of patients, people who are or have been in contact with them and of the immediate environment, as well as those deemed necessary in the event of a transmissible risk”. Similarly, articles 5 and 84 of General Public Health Law 33/2011, of October 4, refer to the previous Organic Law 3/1986, and the possibility of adopting additional measures in case of risk of transmission of diseases. Therefore, in terms of risk of disease transmission, epidemic, health crisis, etc., the applicable regulations have granted “to the health authorities of the different public administrations” (art. 1 Organic Law 3/1986, of April 14) the powers to take the measures necessary provided for in said laws when required by sanitary reasons of urgency or necessity. Consequently, from a personal data processing point of view, the safeguarding of essential interests in the field of public health corresponds to the different health authorities of the different public administrations, who may adopt the necessary measures to safeguard said essential public interests in public health sanitary emergency situations. These competent health authorities of the different public administrations will have to take the necessary decisions, and the different persons responsible for the processing of personal data must follow these instructions, even when it involves the processing of personal health data of natural persons. The foregoing expressly refers to the possibility of processing the personal health data of certain natural persons by those responsible for the processing of

personal data, when, upon the indication of the competent health authorities, it is necessary to communicate to other persons with whom said natural person has been in contact with the circumstance of contagion of these persons, to safeguard both such natural persons from the possibility of contagion (their vital interests) as well as to prevent said natural persons, due to ignorance of their contact with a person infected, from expanding illness to other third parties (vital interests of third parties and essential and/or qualified public interest in the field of public health). Likewise, and in application of the provisions of the occupational risk prevention and occupational medicine regulations, employers may process, in accordance with said regulations and with the guarantees established by these regulations, the data of their employees necessary to guarantee the health of all its employees, which also includes employees other than the data subject, to ensure their right to health protection and avoid contagion within the company and/or work-centres.

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However, the processing of personal data in these health emergency situations, as mentioned at the beginning of this report, continues to be regulated in accordance with the legal instruments for the protection of personal data (RGPD and Organic Law 3/2018, of 5 of December, for the Protection of Personal Data and guarantee of Digital Rights, LOPDGDD), so all data protection principles, contained in article 5 GDPR, are applied, including the principles of legality, loyalty and transparency, purpose limitation (in this case, the safeguarding vital/essential interests of natural persons), accuracy, and of course, and we must especially emphasize it, the principle of data minimization. Regarding this last aspect, it is necessary to make express reference to the fact that the data processed must be exclusively limited to those necessary for the intended purpose, without such processing being extended to any other personal data not strictly necessary for said purpose, without being able to confusing convenience with necessity, because the fundamental right to data protection continues to apply normally, without prejudice to the fact that, as has been said, the personal data protection regulations establish that in emergency situations, for the protection of essential interests of public and/or vital health of natural persons, the necessary health data may be processed to prevent the spread of the disease that has caused the health emergency. Regarding the principle of purpose limitation in relation to cases of processing of health data for reasons of public interest, Recital (54) RGPD is clear, when it establishes that:

“The processing of special categories of personal data, without the consent of the interested party, may be necessary for reasons of public interest in the field of public health. Such processing must be subject to appropriate and specific measures in order to protect the rights and freedoms of natural persons. [...] This processing of health-

related data for reasons of public interest should not result in third parties, such as businessmen, insurance companies or banks, treating personal data for other purposes”.